No. 97-1192

In The

Supreme Court of the United States

October Term, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN SUPPORT OF PETITIONERS

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16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The American College of Trial Lawyers files this brief as *amicus curiae* pursuant to the written consent of the parties.[1]

INTEREST OF AMICUS CURIAE

The American College of Trial Lawyers (the "College"), an organization of lawyers in this country and Canada skilled and experienced in the trial of cases, seeks to improve and enhance the standards of trial practice, the administration of justice and the ethics of the profession. Membership in the College is by invitation. The College strives to induct as Fellows lawyers from the top rank of the trial bar of each jurisdiction. The College limits membership to one percent of the number of persons admitted to practice in any particular state. To qualify as a Fellow, a lawyer must have at least fifteen years of trial experience.

Concern for the preservation of the attorney-client privilege motivates the College to submit this brief. The College considers the privilege a critical feature of our adversary system of justice. The College's Board of

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus curiae* or its counsel.

Regents has authorized the College to seek *amicus curiae* participation in support of petitioners – as it authorized the College to seek *amicus curiae* participation in support of the petition for certiorari – because the issues presented fundamentally affect the relationship between lawyer and client, the administration of justice and the conduct of the legal profession.

The briefs filed by the parties set forth the particular facts of this case and their respective interests in the litigation. The impact of the decision below, however, extends far beyond the parties to this litigation. It will create a substantial gap in the attorney-client privilege by providing that, in certain criminal cases, the privilege does not survive the death of the client. This decision, which runs counter to more than a century of precedent, will have drastic and unfortunate implications for the legal profession and the administration of justice. Accordingly, the College files this brief *amicus curiae* to present the considerations of broader policy with which it is particularly concerned, as well as its view regarding the sweeping, negative impact that is likely to result from the Court of Appeals decision.

SUMMARY OF ARGUMENT

The College urges reversal because the decision of the Court of Appeals contains dangerous implications for attorney-client relations far beyond its narrow factual context. In particular, the Court of Appeals creates a

general theoretical framework for determining the applicability of the attorney-client privilege that threatens continuing future erosion of the privilege. In identifying its goal as "maximiz[ing] the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes," Pet. App. 6a, the court suggests that every challenge to the privilege provides a new occasion for ad-hoc judicial balancing. Underscoring the risks of this approach, the court proceeds to create an exception without the benefit of factual or legal support, making plain that proponents of the privilege bear the burden of demonstrating its utility in every instance. Given the open-ended nature of the court's inquiry, the breadth of its rationale, and the difficulties in proving the benefits of confidential communications, the court's approach potentially supports many additional exceptions to the privilege. Thus, the decision will create a general uncertainty in the minds of lawyers and their clients regarding the scope of the privilege that necessarily will chill the full and frank communications essential to the attorney-client relationship.

The rationales offered by the Court of Appeals for the particular exception it creates are equally broad and no less troubling. The court myopically assumes that clients do not care about posthumous disclosure of their communications in criminal proceedings because the clients will, by definition, not be directly affected by such disclosures. Yet experience teaches the opposite – that clients care deeply about many posthumous developments such as events affecting their reputations and their estates, as well as the ongoing welfare of their friends or

family. Obviously, it is important to preserve clients' ability to confide in lawyers with respect to these subjects. But the logic of the Court of Appeals opinion would support disclosure in these and many other contexts, as it might just as easily be assumed that a client no longer cares about his business or his estate after death. In this respect as well, the decision lays the foundation for future erosion on the privilege.

Clients can draw little solace from the Court of Appeals' efforts to narrow the scope of its exception by limiting it to criminal proceedings and by introducing a balancing test. The distinction between civil and criminal cases breaks down in such instances as civil forfeiture, in which a criminal proceeding against a client's relative may result in forfeiture of the client's property, or in cases involving parallel criminal and civil or administrative proceedings. Limiting disclosure to criminal proceedings based on a post-hoc determination of the "importance" of the communications at issue also does nothing to allay the fear of a client, at the time of a particular communication, that a court will someday order its disclosure. In sum, reversal is appropriate both because the particular exception created by the Court of Appeals is unsound, and because, in creating this exception, the Court of Appeals has written a road map for further and equally unwarranted and unpredictable exceptions to the privilege.

ARGUMENT

I. The Court Of Appeals Decision Lays The Foundation For An Unwarranted Further Erosion Of The Attorney-Client Privilege.

A. The Court Of Appeals Decision Inappropriately Creates A Presumption Against The Attorney-Client Privilege.

The Court of Appeals decision authorizing disclosure of attorney-client communications deemed "important" in certain criminal proceedings following the death of the client, creates an exception to the long-standing common law rule without any factual or legal support. In announcing a standard far easier to state than to apply, the court declares that its "object . . . is to maximize the sum of the benefits of confidential communications with attorneys and those of finding the truth through our judicial processes." Pet. App. 6a. As a threshold matter, the notion that any effort to create an exception to the privilege warrants a fresh policy assessment of the pros and cons of disclosure stands in stark contrast to hundreds of years of authority according absolute protection for attorney-client communications apart from a few, well-defined exceptions such as the crime-fraud and testamentary exceptions.

But even assuming that "maximizing the sum of the benefits of confidential communications and those of finding the truth" represents the proper approach, the court's application of that standard leaves much to be desired. Far from undertaking this inquiry with the precision suggested by the court's formulation, the court proceeds without any empirical evidence to support its

central conclusion that clients are unlikely to be inhibited by posthumous disclosure of their communications to attorneys in subsequent criminal proceedings. Nor does the court identify any cases or statutes supporting its interpretation of the privilege, stressing instead the purported absence of an articulated rationale in the long line of authority supporting survival of the privilege after death as a basis for ignoring this body of precedent.

Essentially, the Court of Appeals creates a presumption against the privilege, burdening its proponents with the task of demonstrating its validity. This approach might be warranted if a new privilege was being created, but given the long and virtually unbroken history of precedent supporting survival of the attorney-client privilege after death, the onus should be on those proposing a departure from the long-standing common law rule to justify the change.

B. The Court Of Appeals' Assumption That Its Decision Will Not Chill Attorney-Client Communications Is Both Unsupported And Unsound.

The court's central assumption – that clients will be indifferent to posthumous disclosure of their communications in criminal proceedings because such disclosure cannot affect them directly – is troubling in several respects. First, it is counterintuitive. Experience teaches that clients care deeply about many posthumous subjects that do not affect them tangibly, such as their reputations after death and legal consequences that might befall friends and family. Clients often seek advice and counsel

from lawyers about these subjects, and value highly the confidential nature of these conversations. The Court of Appeals acknowledges this concern in suggesting that posthumous disclosure of client communications in civil proceedings may not be appropriate, because clients have a "motive to preserve their estates" and thus would be troubled by disclosure of privileged communications that might affect their estates. Pet. App. 6a.

This concern applies with at least equal force in the criminal context. A client troubled about the effect of posthumous disclosure on the size of a bequest for a relative will be equally if not more troubled about the possibility that such disclosure could land the relative in prison. Suppose a client confides in his lawyer, for example, with regard to an estate planning decision influenced in part by his son's drug problem that, after the client's death, becomes the subject of a criminal prosecution. Under the Court of Appeals decision, this client cannot confide in his lawyer without disclosure of information that will be usable against his son.

Likewise, disclosure of a protected communication in a subsequent criminal action may put the client's family member in physical danger. For example, a client may seek legal advice about resistance to extortion or blackmail attempts, only to have his lawyer's subsequent testimony in a criminal proceeding result in retaliation against the client's family. Clients faced with that risk will be discouraged if not prevented from obtaining needed legal advice. The existence of myriad other examples is obvious.

C. The Rationale Of The Court Of Appeals Decision Would Support Other Unwarranted Exceptions To The Privilege.

1. The Notion That Clients Do Not Care About Disclosure Of Communications That Do Not Affect Them Personally Is Not Limited To Posthumous Criminal Proceedings.

The logic of the Court of Appeals' assumption that clients are indifferent to posthumous disclosure extends well beyond the context of this case. As noted, this assumption rests on the faulty premise that clients only care about events that affect them personally. There is no logical limitation of this premise to criminal liability. It is just as natural to suppose that clients will have no concern about the fate of their businesses or the size of their estates after death because at that point they will be no more personally affected by developments in these areas than in a subsequent criminal proceeding. Thus, notwithstanding the court's disclaimers, its rationale would logically support expansion of its exception to posthumous disclosure in all civil proceedings. Worse yet, it is but a short leap to the assumption that clients have no concern about any disclosures they make, even during their lifetime, regarding other individuals or entities, thus paving the way for elimination of the privilege in a wide variety of additional contexts.

There are also practical circumstances in which the Court of Appeals' distinction between civil and criminal cases will prove unworkable. For example, a criminal proceeding against a client's child may result in a civil forfeiture action against the client's property. *See, e.g., United States v. One Parcel of Property at 31-33 York Street,*

930 F.2d 139 (2d Cir. 1991) (affirming forfeiture of house belonging to mother following arrest of her sons for drug sales allegedly conducted from the house). In such a case, introduction of a communication as evidence in a criminal proceeding may unavoidably affect a civil proceeding as well, thereby preventing the client from claiming the benefit of the privilege in that proceeding.

Nor is the overlap between criminal and civil proceedings limited to the forfeiture area. Parallel criminal and civil or administrative proceedings occur with increasing frequency in the areas of antitrust, tax, government contracts, and securities law. Under the Court of Appeals decision, disclosure of a privileged communication in, for example, a criminal antitrust action might lead to liability in a subsequent civil class action based on the same conduct. Similarly, disclosure in a criminal fraud action could result in debarment or license violation proceedings entailing devastating consequences to family, friends and business associates. Nor is there a practical method to limit disclosure of the privileged communications to the particular criminal proceeding, for, as the Court has recognized in the analogous context of the privilege of self-incrimination, once disclosure is made, the court ordinarily cannot "unring the bell." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

2. The Rationale Based On A Client's Unavailability To Testify Is Not Limited To Posthumous Disclosures.

The court's alternative rationale for its exception – that disclosure is needed to obtain truthful testimony

because of the unavailability of the client – has equal potential to lead to further erosion of the privilege. As pointed out in Judge Tatel's dissent, death is not the only circumstance in which a witness is unavailable. "Witnesses unable to remember facts, incompetent to testify, or beyond the court's process likewise deny relevant information to the factfinder." Pet. App. 25a. Moreover, "[t]he unavailability of a witness likewise does no greater harm to the factfinding process than an available witness who testifies inaccurately." *Id.* Accordingly, the rationale that truthful evidence must be adduced also contains significant potential for expansion of the Court of Appeals' exception.

II. Even Accepting *Arguendo* The Logic Of The Court Of Appeals' Exception, The Costs Of The Exception In Terms Of Chilling Attorney-Client Communications Far Outweigh Any Countervailing Benefits To The Truth-Seeking Process.

The Court of Appeals decision is all the more troubling because it is sweeping in its potential application. Although the decision only provides for disclosure of attorney-client communications in federal criminal proceedings, it will inhibit client communications in a myriad of contexts in lawyers' offices across the nation. Thus, the decision will preclude clients from relying upon the laws of their home states, which are almost certain to provide that the privilege survives the death of the client. *See* Pet. at 13 n.13 (citing state statutes); Pet. App. 17a (Court of Appeals dissenting opinion).

The evisceration of state privilege laws that will result from the Court of Appeals opinion is of great concern because, as this Court has previously concluded, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996). Additionally, "any State's promise of confidentiality would have little value if the [client] were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Id.*

The significance of the Court of Appeals opinion is likely to be enhanced rather than reduced by use of the court's balancing test to determine whether posthumous disclosure is justified in the particular case. The inherently unpredictable and post-hoc nature of the balancing test will create ambiguity concerning the scope of the privilege. Accordingly, no lawyer will be able to offer any assurance to a client that a future court will apply the test to deny disclosure of that client's communications. On the contrary, a lawyer will be bound to warn the client of the prospect of posthumous disclosure along the lines set forth in Judge Tatel's dissent, and perhaps of current disclosure should the client be "unavailable" for some other reasons. Pet. App. 20a (lawyer must warn client that "when you die, I could be forced to testify – against your interests – in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution"). The Court of Appeals' amorphous balancing test thus creates the very problem that led this Court to reject the "control

group" test for the attorney-client privilege in the corporate context – that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

The Court of Appeals decision will have an overall negative rather than positive effect on the administration of justice. For each time a prosecutor is able to convince a trial judge that the privileged information sought is "substantially important" to a pending criminal proceeding, there will have been hundreds if not thousands of instances in which clients will have been deterred from confiding in their lawyers for fear of posthumous disclosure. Thus, while the Court of Appeals decision will assist prosecutors only in rare cases in which a deceased client has confided "substantially important" information to his lawyer that is not available from any other witness, the ruling will have a significant and very negative impact on many communications between clients and their attorneys in the future.

Moreover, except in a narrow set of circumstances – such as cases involving statements against the client's penal interest when "corroborating circumstances clearly indicate the trustworthiness of the statement" under Fed. R. Evid. 804(b)(3) – the client communications that the lawyer may be obligated to disclose to the grand jury will constitute hearsay inadmissible at a subsequent criminal trial. This hearsay limitation further reduces the practical benefits to the truth-seeking function that will result from the Court of Appeals' exception. Thus, though the Court

of Appeals seeks to craft a narrow exception, the aggregate costs of inhibiting full and frank client communications will far exceed any benefits to the truth-seeking process.

CONCLUSION

For the reasons stated, it is respectfully requested that the judgment be reversed with instructions to affirm the District Court judgment quashing the subpoenas issued to the petitioners.

Respectfully submitted,

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